82-489

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

TEMORA TRADING CO., INC.,

Petitioner,

vs.

WALLACE PERRY, as Trustee of the Bankrupt Estate of Boyd James O'Donnell and Joan O'Donnell, Bankrupts,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

RICHARD M. MONEYMAKER

Suite 606
700 South Flower Street
Los Angeles, CA 90017
(213) 622-1088

Attorney for Petitioner

QUESTIONS PRESENTED

1. Whether a Bahamian Corporation has been denied due process of law when its real property was confiscated by a Nevada court which struck its answer and entered a default judgment against it, in an in rem action, because its officers refused to attend depositions in the Bahamas unless they were conducted under the requirements of Bahamian Law?

2. Whether a Bahamian Corporation was denied due process of law by the action of the Nevada court, in ordering depositions of its officers in the Bahamas, without complying with Bahamian Law, and then striking the Answer of the Bahamian Corporation when it insisted that the Plaintiff follow the requirements of Bahamian Law in conducting the depositions?

PARTIES TO THE PROCEEDINGS BELOW

The parties to Nevada State Court in rem action are Plaintiff-Appellee Wallace Perry as Trustee in Bankruptcy of the Bankrupt Estate of Boyd James O'Donnell and Joan O'Donnell, and Defendant-Appellant Temora Trading Co., Ltd., a Bahamian Corporation, and the Defendants Boyd James O'Donnell, Joan O'Donnell, Michael W. Mogan, Burton Bergeron, Eugene Fox, Ted Ivy, James Gleason, a fictitious person, Nuovo Anstalt, a Lichtensteinian Trust, and Does 1 through 100, inclusive. The identity of the Does 1 through 100, has not been divulged by Plaintiff and Respondent.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

TEMORA TRADING CO., INC.,

Petitioner,

vs.

WALLACE PERRY, as Trustee of the Bankrupt Estate of Boyd James O'Donnell and Joan O'Donnell, Bankrupts,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

Petitioner Temora Trading Co., Ltd., respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the decision of the Supreme Court of the State of Nevada.

OPINIONS BELOW

1. The Opinion of the Nevada Supreme Court is annexed hereto as Appendix A. The Order Denying Rehearing is annexed as Appendix B.

2. The Opinion and Judgment of the District Court of the Fourth Judicial District of the State of Nevada, In and For the County of Elko entered on July 13, 1981 is annexed hereto as Appendix C.

3. The Opinion of the Ninth Circuit Court of Appeals dated January 26, 1979, is annexed hereto as Appendix D.

JURISDICTION

1. The Judgment sought to be reviewed is that of the Nevada Supreme Court which was made and entered on

May 27, 1982, and a copy thereof is annexed to this Petition at Appendix A. Petitioner timely filed a Petition for Rehearing in that Court which was denied on June 23, 1982. (See Appendix B.)

2. This Petition for Certiorari was filed within 90 days of June 23, 1982.

3. The jurisdiction of this Court is invoked under 28 U.S.C. §1257, and Rule 17 of the Rules of this Court.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

1. The Fourteenth Amendment to the Constitution of the United States Section 1 provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce

any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Nevada Rules of Civil Procedure 37(d) provides as follows:

"Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action

authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereof, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

"The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c)."

3. The Bahamian Bank and Trust Companies Regulation Act is annexed hereto as Appendix E.

4. The Text of the following Statutes is reproduced in Appendix F.

Section 11(e) of Federal Bankruptcy Act of 1938 (11 U.S.C. §29(e)).

Section 70(a) of Federal Bankruptcy Act of 1938 (11 U.S.C. §110(a)).

STATEMENT OF THE CASE

Boyd O'Donnell was a businessman residing in Southern California, who during the 1960's had acquired title to certain real estate interests located both in Southern California and Nevada. James Gleason was a businessman and citizen of the United Kingdom, living in the Bahamas. O'Donnell had become indebted to him in the latter part of 1968 and 1969 for monies loaned and had deeded to him his real estate interests to secure the debt. O'Donnell could not pay these debts and the transfers for security were then made absolute in

payment of O'Donnell's debts by the latter part of 1969. O'Donnell's brother, Robert, along with some of Robert's business entities, also assigned some real estate interests to Gleason.

On March 13, 1970, Boyd and his then wife, Joan O'Donnell, filed voluntary Petitions in Bankruptcy in Phoenix, Arizona, and Wallace Perry was appointed and acted as the O'Donnells' Trustee in Bankruptcy. This case was filed under the old Bankruptcy Act, in force at that time. Thus, the provisions of the new Bankruptcy Code, effective October 1, 1979, do not apply to this proceeding.

O'Donnell's former attorney, Eugene Wolver, and a former business associate Walter Goodwin, filed objections to O'Donnell's discharge in Bankruptcy,

contending, among other things, that James Gleason did not exist, and on the date of bankruptcy, March 13, 1970, O'Donnell still owned the realty and thus title to this realty had passed to Perry by operation of law.

Perry then secured the issuance of a series of injunctions restraining a variety of persons, including Gleason, from further transferring the realty, until Perry could determine the validity of Gleason's title. The injunctions were issued first by the Arizona Bankruptcy Court. Later in 1971 Perry instituted ancillary Bankruptcy proceedings in California, and started obtaining the issuance of injunctions there. The procedure was to locate a piece of property to which Perry might be able to conjure up a claim, and then get an

injunction issued which would then be recorded with the County Recorder in the County where the realty was located and thus cloud the title. Perry did not file any lis pendens, since he never filed any actions to actually determine the validity of Gleason's title. The applications for the injunctions themselves were never served upon Gleason or Temora, a fact of great importance. Perry obtained an injunction and served it on Mogan, Fox, Ivy and Bergeron, land sales contract vendees from O'Donnell, of the Nevada realty which contracts had also been assigned to Gleason. Perry, in 1971, intercepted those payments and had Mogan, et al, pay them to him despite the fact the applications for the injunctions were never served on Gleason or Temora, and they never had a

chance to resist them. Perry seized over $100,000.00 in payments, which were the only funds in O'Donnell's bankruptcy.

In July 1971, Gleason decided to transfer his real estate holdings to Temora, in exchange for the controlling stock of that corporation. On July 7, 1971, Gleason appeared before A.L. Halff, the American Vice Consul in the Bahamas, and had his signature notarized upon the deeds, assignments and other conveyances. With him were O'Donnell and Robert Timbrook, an architect. Temora then issued its shares to Gleason in exchange for the realty. Temora then recorded all of these conveyances in the counties where the land was located both in California and Nevada. Gleason then delivered his shares to a Lichtenstein

trust known as Nuovo Anstalt.

In 1974, Temora attempted to sell some land in California and found its title clouded by the recorded injunctions. Temora filed a lawsuit against Perry seeking to have the California Bankruptcy Court declare that the injunctions were void and invalid as to it, since the applications upon which they were based were never served upon Gleason, Temora's predecessor in title, and that the injunctions did not name Temora. In 1975, the case was tried in the United States Bankruptcy Court, Central District of California. While Perry never counter nor cross claimed, he resisted Temora's action on the theory Gleason was a fictitious person. That was the sole factual issue raised by Perry in the pre-trial order that

governed the trial. The Bankruptcy Judge allowed Perry to present evidence upon this issue, but at the end of the trial, ruled that Perry had not proved his contention that Gleason and O'Donnell were the same or that Gleason didn't exist. The Bankruptcy Judge refused to give judgment to Temora, on other technical grounds. Temora appealed, and eventually secured a reversal in the Ninth Circuit Court of Appeals, which held all of the injunctions were void for lack of jurisdiction over Gleason. Temora contends that judgment is res adjudicata on the whole issue of this lawsuit. A copy of that decision is annexed hereto as Appendix D.

Starting in 1974, and continuing through 1977, Perry then began to file a

series of actions; first in the Bankruptcy Court in Arizona and then in California, seeking to set aside Temora's title. Temora objected to these actions upon the grounds that it chose not to submit itself to the summary jurisdiction of the Bankruptcy Court where it would be denied the right to a trial by jury. Perry never filed any counter or cross claim against Temora in the action Temora had started in the Bankruptcy Court where Temora had submitted itself to jurisdiction.

Finally, on September 1, 1977, Perry started this action, as an in rem action, to quiet title to the real estate in Nevada. Temora answered and then moved for a summary judgment upon the ground that all federal and state statute of limitations had long since

expired, and that the California Judgment of October 2, 1975, was res adjudicata on the issues of this case, and barred Perry from bringing this action.

The trial Judge denied Temora's motion on both grounds.

Perry then filed a Fourth Amended Complaint to set aside, as fraudulent conveyances, the transfers made by O'Donnell to Gleason back in 1965-1969. The trial court, however, continued to allow Perry to conduct a "fishing expedition" by discovery into the assets and business affairs of Temora, totally unrelated to those transfers, up to and including the present time. Temora repeatedly and continuously objected to any scrutiny beyond the date of the transfers of O'Donnell to Gleason, which were the

only transactions attacked by Perry's complaint.

Temora's position, which remained unchanged throughout the litigation, was that if Gleason existed, then O'Donnell's transfers were valid and on March 13, 1970, the date of Bankruptcy, O'Donnell held no title which passed to his Trustee in Bankruptcy, Perry. If Gleason did not exist, then on March 13, 1970, O'Donnell still held the property and title passed to Perry regardless of what O'Donnell did with it after that date. If Gleason did obtain the title, then what he did with it after Bankruptcy was no concern of Perry. Gleason could have given the property back to O'Donnell and Perry would have no claim to it, since Perry's rights were fixed as of March 13, 1970.

This lawsuit was never an action to declare that Temora was O'Donnell's alter ego, or to pierce Temora's corporate existence. Thus, Temora's transactions in the late 1970's were totally irrelevant to the issues of this lawsuit. The attempt to depose Temora's officers, namely Donald Aberle, Anthony F. Bowe and Lorraine Burrows, should also have been denied since they didn't even become officers of Temora until 1976, when their corporation, Columbus Trust Co., took over the management of Temora.

The trial Judge continually and summarily denied Temora's attempt to limit discovery and to focus the lawsuit upon its true issues; to wit, the transfers from O'Donnell to Gleason, and

the state of the title to the realty as of March 13, 1970.

Eventually, Perry noticed the deposition of Aberle, Bowe, and Burrows for April 2, 1981. Aberle refused to appear at the deposition scheduled in the American Consulate in Nassau, upon the grounds he was prohibited from doing so, without an order from a Bahamian Court, under the Bahama's Bank and Trust Companies Act. A copy of that Statute is annexed hereto as Appendix E. Perry then had his Elko counsel secure an Ex Parte Order from the trial Judge requiring Aberle's appearance for the next day. That Ex Parte Order was served late the afternoon of April 2, 1981, on Temora's Elko counsel, Richard Barrows. When Aberle refused to appear

the next day, Perry cancelled all further depositions.

Perry filed a Motion for Sanctions, or in the Alternative, for a Summary Judgment. Temora resisted raising the issue of both the Statute of Limitations, the irrelevancy of Aberle's testimony and the issue of Bahamian Law. The Court struck Temora's Answer and entered a Default Judgment quieting title to all of Temora's realty in both Nevada and California, without requiring Perry to supply any evidence of any sort. Much of this property had not been transferred to Gleason by Boyd, but by Robert O'Donnell, and other corporate entities.

The Ex Parte Order of April 2, 1981, since it involved an exercise of judicial discretion, was void under

Nevada Law and could not be the basis of a sanction order. None of the Court Findings were supported by any admissible evidence, but, even so require a judgment in favor of Temora and not Perry. Perry's counsel admitted on the record that the affidavits in support of his Motion were all defective.

ARGUMENT

I.

A FOREIGN CORPORATION OWNING LAND IN NEVADA IS ENTITLED TO THE PROTECTION OF THE FOURTEENTH AMENDMENT IN DEFENDING ITS PROPERTY INTEREST.

It has long been established that the due process clause of the Fourteenth Amendment applies to aliens.

Kwong Hai Chew v. Colding, 344 U.S. 590, 73 S.Ct. 472, 97 L.Ed. 576 (1952).

As far as property rights are concerned, it is generally accepted that private corporations are "persons" within the scope of the guaranties of due process, and in this respect fall within the protection of the constitution, and this includes foreign corporations permitted to do business within a state.

Connecticut General Life Ins. Co. v. Johnson, 303 U.S. 77, 58 S.Ct. 436, 82 L.Ed. 673 (1938).

Kentucky Finance Corporation v. Paramount Auto Exchange Corporation, 262 U.S. 544, 43 S.Ct. 636, 67 L.Ed. 1112 (1923).

II.

IT WAS A DENIAL OF DUE PROCESS TO STRIKE TEMORA'S ANSWER FOR RAISING A PROCEDURAL REQUIRMENT OF BAHAMIAN LAW AS TO DEPOSITIONS OF ITS OFFICERS BEING CONDUCTED IN THE BAHAMAS.

The Nevada Supreme Court decision upheld the trial Court only as a default judgment. This was based upon the conclusion that the failure of Temora's officers to appear at their depositions in the Bahamas was willful. The Supreme Court simply overlooked the decision of this Court in **Societe Internationale Pour Participation Industrielles et Commerciales, SA v. Rogers**, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958) which held that the harsh sanction of striking an answer and entering a default judgment cannot be applied when failure to obey the order

of the Court was occasioned by the party's inability to do after good faith efforts at compliance. In addition, the Nevada trial Court held no hearings nor took any evidence on the issue of Temora's lack of good faith, or of the applicability of Bahamian Law. Its conclusion that Temora was avoiding discovery was an excuse used by a hostile and biased trial Court to reach a result it could not reach on the merits.

Secondly, Temora's officers never refused to attend the depositions. They merely insisted that Perry follow the requirements of Bahamian Law, in securing their deposition. The procedures for a deposition under Bahamian Law are identical for the procedures for deposing a non-party witness under Nevada Law. It simply requires the filing of

an ancillary action in a Bahamian Court and the issuance of process by that Court.

Perry's bad faith is demonstrated by his failure to even attempt to comply with the Bahamian Bank and Trust Company Act. Perry wanted an excuse to win by default, and the trial Court granted this default without a hearing or testimony.

Even assuming that the Bank and Trust Companies Act granted Temora a mere privilege which it could waive, the Federal Courts have uniformly held that a party litigant cannot be forced to choose between its privilege and its lawsuit.

Wehling v. Columbia Broadcasting System, 608 F.2d 1084 (5 C.A. 1979).

International Union Etc. v. National Right To Work, 590 F.2d 1139 (D.C. C.A. 1978).

Familias Unidas v. Briscoe, 544 F.2d 182 (5 C.A. 1976).

United States v. Costello, 222 F.2d 656, 21 F.R. Serv. 37b. 244, Case 1 (2 C.A. 1955).

III.

THE TRIAL COURT'S FINDINGS MANDATED A JUDGMENT FOR TEMORA IN THAT THEY FOUND GLEASON EXISTED, THUS ESTABLISHING THE BAR OF THE TWO YEAR FEDERAL STATUTE OF LIMITATIONS.

The Nevada Supreme Court decision used the excuse of striking Temora's answer to circumvent the two year Statute of Limitations found in Section 11(e) of the Federal Bankruptcy Act of 1938 (11 U.S.C. 29(e)).

Feldman v. First National Bank City Bank, 511 F.2d 460 (2 C.A. 1975).

The decision overlooked the fact that even the hostile and biased trial Judge did not swallow Perry's contention that Gleason was a fictitious person and specifically found in Findings of Facts No. 1, 2, and 3 of his Judgment (Appendix C) that Gleason did exist and that O'Donnell transferred the real estate to him. The trial Judge then went on to find Temora was O'Donnell's alter ego. This theory was never plead by Perry, and was irrelevant, since, if Gleason existed and held title on March 13, 1970, Gleason could have given it back to O'Donnell after bankruptcy and Perry could not complain. Perry's rights as

Trustee in Bankruptcy were fixed on March 13, 1970.

Section 70(a) Bankruptcy Act of 1938 (11 U.S.C. §110(a)).

The Nevada Supreme Court also ignored the res adjudicata effect of the Ninth Circuit decision which Temora had placed in evidence when it filed its Motion for Summary Judgment in the case (Appendix D).

SUMMARY

A provincial, biased and hostile trial Court essentially confiscated Temora's property, without a trial and without receiving any evidence on the merits of an action filed on September 1, 1977, against Temora as a defendant. When Temora appeared and defended on the grounds of the Statute

of Limitations, and the Doctrine of Res Adjudicata, its Motion for Summary Judgment was denied without reason or excuse.

The trial Judge then permitted Perry to conduct discovery into corporate affairs of Temora, totally unrelated to the issues of the lawsuit, and over Temora's repeated objection. When Temora resisted deposition of its officers upon the grounds that Perry was not following the procedures established by Bahamian Law, its Answer was struck, and its property confiscated. The trial Judge did not even attempt to determine whether the provisions of Bahamian Law were applicable, but found Temora's counsel acted in "bad faith" in urging the protection of the Bahamian Statutes.

This case has extreme importance, at a time when many foreign corporations and persons are investing in the United States. This Court should undertake to consider when the laws of the foreign corporation country, can be summarily disregarded to justify an unconstitutional seizure of property.

Respectfully submitted,

RICHARD M. MONEYMAKER

Attorney for Petitioner

IN THE SUPREME COURT
OF THE STATE OF NEVADA

TEMORA TRADING COMPANY, LTD.,
a purported trust,

Appellant,

vs.

WALLACE PERRY, as Trustee of
the Estate of Boyd James
O'Donnell and Joan O'Donnell,
Bankrupts,

Respondent.

No. 13531

F I L E D
MAY 27 1982
C.R. DAVENPORT
Clerk of Supreme Court
By /s/Judith Fountain
Deputy Clerk

Appeal from order striking defendant's answer, entering a default judgment, and awarding summary judgment. Fourth Judicial District Court, Elko County; Joseph O. McDaniel, Judge.

Affirmed.

Wilson, Wilson and Barrows, Ltd.,
Las Vegas;
Moneymaker & Morrison,
Los Angeles, California,
for Appellant.

Goicoechea, DiGrazia & Marvel,
Elko; Russell Piccoli,
Phoenix Arizona,
for Respondent.

O P I N I O N

PER CURIAM:

Respondent Wallace Perry, as Trustee of the Estate of Boyd James O'Donnell and Joan O'Donnell, Bankrupts, commenced this action in the district court to quiet title to certain property located in Elko County.

The District judge, after finding that appellant-defendant Temora Trading Company, Ltd. had willfully failed to comply with the court's discovery orders, struck Temora's answer. NRCP

37(b). Summary judgment was entered in favor of the Trustee. This appeal followed:

THE FACTS

O'Donnell filed for bankruptcy in Arizona. Respondent Perry was named trustee in the bankruptcy proceedings. Although O'Donnell was adjudicated bankrupt, he was denied a bankruptcy discharge. Just prior to filing his petition for bankruptcy, O'Donnell transferred valuable real estate holdings to a James Gleason, who allegedly transferred the property to Temora.

Discovery was protracted and bitterly fought. Eventually, Perry noticed the depositions of three of Temora's officers in the Bahamas. At the time set

for their depositions their local attorney appeared and stated that they would not be deposed without an order from a Bahamian court. Perry obtained an order from the district court in Elko compelling Temora to produce its officers. The order was served on Temora's counsel in Elko. The officers still refused to comply.

Thereafter, the district court struck Temora's answer and entered a default judgment against Temora. Temora argues that the district court abused its discretion by granting a default judgment as a sanction for failure to honor the court's orders. Temora also suggests that Perry's complaint fails to state a cause of action because it appears on the face of the complaint that the cause is barred by the statute of limitations.

We reject Temora's contentions and we affirm the default judgment.

THE DEFAULT JUDGMENT

NRCP 37(b) empowers the district court with a broad range of sanctions that may be invoked when parties fail to comply with discovery orders. The court may strike all or part of a party's pleadings, and enter a default judgment.

The sanction of dismissal or default may be imposed only in cases of willful noncompliance of the court's orders. **Finkelman v. Clover Jewelers Boulevard, Inc.**, 91 Nev. 146, 532 P.2d 608 (1975). The district judge in the instant case found that Temora's failure to comply was willful. That finding is supported by substantial evidence, including Temora's history of obstructing discovery, as well as the failure of

Temora's officers to appear for their depositions. 1/

1/ Temora was not responsive to certain interrogatories. In response to interrogatories 8 and 9, counsel for Temora, Mr. Moneymaker, stated that "James Gleason -- address unknown" formed Temora and contributed all its property. The Nassau attorney who formed Temora, Mr. Ralph Seligman, in his deposition testified to the contrary:

MR. MONEYMAKER: All right. Now I take it -- has Mr. Gleason or Temora Trading Company waived the attorney-client privilege of confidentiality imposed upon you under Bahamian law?

THE WITNESS: There is no attorney-client privilege between myself and Temora. As far as Mr. Gleason is concerned, I am satisfied the gentleman does not exist.

MR. MONEYMAKER: All right. I take it, what you are telling me is that James Gleason, to your knowledge, has not waived the privilege?

THE WITNESS: Mr. James Gleason, to my knowledge, does not exist, and therefore there is no privilege to waive.

MR. MONEYMAKER: I take it --

THE WITNESS: I am satisfied that I was duped as an instrument of fraud, and this is the reason I have sworn my affidavit.

In **Skeen v. Valley Bank of Nevada**, 89 Nev. 301, 511 P.2d 1053 (1973), this court held:

> "Default judgments will be upheld where the normal adversary process has been halted due to an unresponsive party, because diligent parties are entitled to be protected against interminable delay and uncertainty as to their legal rights. 89 Nev. at 303; 511 P.2d at 1054.

THE STATUTE OF LIMITATIONS

Temora argues that even if the district court did not err in striking its answer, it was error to grant a default judgment. Temora's contention is that Perry's complaint failed to state a cause of action because it did not plead facts showing that the statute of limitations was tolled. See **Kellar v. Snowden**, 87 Nev. 488, 489 P.2d 90 (1971);

Bank of Nevada v. Friedman, 82 Nev. 417, 420 P.2d 1 (1966).

However, Perry alleged in his complaint that Gleason was a fictitious person. When the answer was stricken, all of Perry's allegations were taken as true. A transfer of property to a fictitious person is a complete nullity, transferring no title. An action to avoid such a transfer is not subject to the statute of limitations. **Gayle v. Jones**, 63 F.Supp. 481 (W.D. La. 1945); **Houghton v. Houghton**, 116 So. 493 (La. 1928).

RES JUDICATA

Finally, Temora suggests that Perry's complaint is barred by the doctrines of res judicata and collateral estoppel. These were affirmative defenses included

in Temora's answer. The defenses were stricken with the answer.

The judgment is affirmed.

/s/Gunderson, C.J.
GUNDERSON

/s/Manoukian, J.
MANOUKIAN

/s/Springer, J.
SPRINGER

/s/Mowbray, J.
MOWBRAY

/s/Steffen, J.
STEFFEN

Attest: A full, true and Correct Copy.
C.R. Davenport, Clerk of the Supreme Court
By/s/Judith Fountain Deputy.

IN THE SUPREME COURT
OF THE STATE OF NEVADA

TEMORA TRADING COMPANY, LTD., ANTHONY F. BOWE, and ELIZABETH A. SMITH,

Petitioners,

vs.

THE HONORABLE JOSEPH O. McDANIEL, District Judge in the Fourth Judicial District Court of the State of Nevada, in and for the County of Elko,

Respondent.

No. 13991

F I L E D:
June 23, 1982
C. R. Davenport
Clerk of Supreme Court
By /s/Judith Fountain
Deputy Clerk

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c)(1).

It is so ORDERED.

/s/Gunderson, C.J.
Gunderson

/s/Menoukian, J.
Menoukian

/s/Springer, J.
Springer

/s/Mowbray, J.
Mowbray

/s/Steffen, J.
Steffen

cc: Hon. Jospeh O. McDaniel,
District Judge
Messrs. Terry & Winter
Richard M. Moneymaker, Esq.
Messrs. Goicoechea & DeGrazia
Messrs. Wilson, Wilson & Barrows
Russell Piccoli, Esq.
R. L. Kane, Clerk

NO. 14762

IN THE DISTRICT COURT
OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF NEVADA,
IN AND FOR THE COURT OF ELKO

WALLACE PERRY as Trustee of the estate of BOYD JAMES O"DONNELL and JOAN O'DONNELL, Bankrupts,

Plaintiff,

vs.

BOYD JAMES O'DONNELL, JOAN O'DONNELL, TEMORA TRADING COMPANY, LTD., a Bahamian corporation, MICHAEL W. MOGAN, BURTON BERGERON, EUGENE FOX, TED IVY, JAMES GLEASON, a fictitious person, NUOVO ANSTALT, a Liechtensteinian trust, and DOES I through 100, inclusive,

Defendants.

FILED:
1981 JUL 13 PM 2:57
Clerk R.L. Kane
Deputy /s/

ORDER GRANTING PLAINTIFF'S MOTION TO DISMISS FOR FAILURE TO MAKE DISCOVERY, AND SUMMARY JUDGMENT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff's Motion to Dismiss for Failure to Make Discovery and in the Alternative for Summary Judgment having come on regularly for hearing on May 12, 1981, the Court having examined the Affidavits and other documentation produced by the parties, considered the memoranda and oral argument of respective counsel and being fully advised in the matter, now makes Findings of Fact and Conclusions of law as follows:

FINDINGS OF FACT

1. During the late 1960's the Bankrupt BOYD JAMES O'DONNELL (hereinafter called O'DONNELL) and JOAN O'DONNELL, his wife, acquired the subject real property situated in the County of Elko,

Nevada, and in the Counties of Los Angeles and San Bernardino in California, either individually or through other entities under the control of O'DONNELL.

2. Thereafter all of the subject propery was conveyed to JAMES GLEASON.

3. On March 13, 1970, the O'DONNELLS filed their Petition in Bankruptcy in the U.S. District Court for the District of Arizona. They alleged therein that they were insolvent and did not list the subject property as assets. JAMES GLEASON then conveyed the subject property to Defendant TEMORA TRADING COMPANY, LTD. (hereinafter called TEMORA), a Bahamian corporation. Stock was issued GLEASON, and then it was transferred to NUOVO ANSTALT, a Liechtenstein trust.

4. In 1972, O'DONNELL's Discharge in Bankruptcy was denied for making false

statements in the Bankruptcy proceedings.

5. The Trustee in Bankruptcy, WALLACE PERRY, in his investigation of the transfers of the subject property suspected that JAMES GLEASON was either a fictitious person or a "straw man," and that the aforesaid transactions were a fraudulent scheme whereby O'DONNELL would retain the control and benefit of the subject property free and clear of his creditors.

6. After many years of litigation in the Federal Bankruptcy Courts in Arizona and California, and the U.S. District Court in California, in which TEMORA's attorney, Richard M. Moneymaker, was successful in obtaining dismissals for lack of jurisdiction, the litigation ended up in this Court as a Quiet Title

action filed on September 1, 1977. Plaintiff was and is relying on certain "badges of fraud" in connection with the various conveyances to prove fraudulent conveyances.

7. Mr. Moneymaker, on behalf of his client TEMORA, has contended throughout that his client was a bona fide corporation with a Board of Directors and Stockholders, engaged in lawful business transactions. That the Plaintiff and his attorneys were engaged in a never-ending, malicious harassment of TEMORA.

8. Plaintiff served 120 Interrogatories on TEMORA on January 27, 1978. Partial Answers were filed on March 7, 1978. The Answers were not made by any officer or managing agent of the corporation, but by Mr. Moneymaker, as attorney-in-fact, pursuant to a General Power

of Attorney. Except for filing a copy of the Articles of Association and Memorandum of Association for TEMORA, and a description of the land and the names and addresses of the then Board of Directors, Mr. Moneymaker objected to all other questions on the grounds of relevance. This resulted in denying Plaintiff any discovery whatsoever. After a two-and-a-half year war of Motions, further Answers were filed, again by Mr. Moneymaker. Much of the delay was justified while a determination of the issue of whether JAMES GLEASON was a fictitious person, was res judicata resulting from Orders made in the Federal Courts in previous litigation. This problem even involved Appeals to the Ninth Circuit Court of Appeals.

9. Plaintiff's efforts to take the despositions in 1979 of the Board of Directors, Donald Aberle, A. F. Bowe and L. D. Burrows, were met with Motions for Protective Orders filed on behalf of TEMORA.

10. After the Fourth Amended Complaint was filed on May 18, 1980, and Defendant TEMORA filed its Answer, the aforementioned Answers to Interrogatories were filed on November 12, 1980, the Court having entered an Order to Compel Answers on September 9, 1980. These Answers did provide some information concering TEMORA's ownership and operations. The name and address of the person having custody of the stock book and corporate minute book was given as Mr. Donald Aberle, Nassau, Bahamas. That Dr. Kicher, Basil, Switzerland, had

possession of the financial statements. Also of interest was the statement that O"DONNELL was a joint signator with Mr. Moneymaker on a TEMORA bank account in Glendale, California; that O'DONNELL had operated and managed the Mediterranean Apartment Building for TEMORA since 1976, after the building had been acquired by TEMORA on a foreclosure sale, and he later sold the building for TEMORA. The Answers pointed the way for further discovery on the part of the Plaintiff.

11. In the meantime, Plaintiff's attorney, Russell Piccoli, investigated information that O'DONNELL was doing business as TEMORA TRADING COMPANY. He traveled to Los Angeles in April of 1979 and interviewed Arthur Silberman and

Geoffrey Miller. Mr. Miller's Deposition was later taken on June 5, 1979. He testified that O'DONNELL was operating a diesel fuel business under the name of TEMORA TRADING COMPANY, and represented that it was O'DONNELL's company.

12. Mr. Piccoli then flew to Switzerland to interview the two Swiss directors of TEMORA and the Trustee of NUOVO ANSTALT. He found that Dr. Kicher was really Dr. Iur. Walter H. Keicher who resides in Vaduz, Liechtenstein. He had formed the NUOVO ANSTALT Trust and had received instructions from O'DONNELL. When he was pressed for documents, Dr. Keicher suggested that Mr. Piccoli obtain Letters Rogatory from the Court, addressed to him, and he would then answer the questions.

Letters Rogatory were obtained, addressed to Dr. Keicher and also to Dr. H. U. Stucki. TEMORA, by and through its attorney, Mr. Moneymaker, submitted Cross Interrogatories. They consisted of two questions which in effect told Dr. Keicher and Dr. Stucki to clam up and don't tell them anything. They didn't respond.

13. Mr. Moneymaker was noticed for a Deposition personally. He claimed an attorney-client privilege.

14. In February of 1981, after prior interviews by Mr. Piccoli, Ralph David Seligman, the Bahamian attorney who was involved in forming TEMORA, gave an Affidavit. This was the first real, direct evidence to support Plaintiff's allegations. Mr. Seligman also appeared for a Deposition in the American Embassy

at Nassau, Bahamas, on April 2, 1981. After several questions by Mr. Piccoli, Mr. Moneymaker asked to be permitted to question the witness on voir dire. The questions indicated that Mr. Seligman should refuse to answer any questions and take advantage of the Bahamian privilege of non-disclosure, or to claim an attorney-client privilege. Mr. Seligman was not so inclined. Seligman then testified that TEMORA was formed as a "shelf corporation" by him and his former associate, Sir Guy Henderson, in 1969. This means that the corporation was formed, using Sir Guy and office personnel as the Board of Directors, each of whom was issued one share of stock. The corporation was then dormant (on a shelf) until someone wished to purchase it. He testified that TEMORA

was purchased by O'DONNELL, reportedly for JAMES GLEASON, on August 12, 1971. The deeds from GLEASON to TEMORA were dated in July, 1971. Mr. Seligman at no time ever met JAMES GLEASON. His only contact was with MR. O'DONNELL, Max Fink, a Los Angeles attorney, and Dr. Keicher of the NUOVO ANSTALT Trust. By 1979 he was convinced that he was being "used" by MR. O'DONNELL in a fraudulent scheme and requested that the affairs of TEMORA be assigned to someone else. Sir Guy Henderson also gave an Affidavit wherein he stated he had never met JAMES GLEASON.

15. During the first part of 1981, Plaintiff really got lucky. Apparently in December of 1980, O'DONNELL began having marital problems with his present wife, Irene Blank O'Donnell. She

contacted Attorney Eugene L. Wolver, Jr., of Los Angeles, in regard to a divorce. O'DONNELL had left certain records in her home when they separated. She turned these records over to Wolver. He turned them over to Walter Goodwin, one of O'DONNELL's creditors, who then turned them over to Mr. Piccoli. Further records between O'DONNELL and TEMORA were found in the files of Blanc Investment Compmany, owned by Irene Blanc O'Donnell, and turned over to Mr. Piccoli. Mr. Piccoli then filed the papers with the Court. The correspondence between O'DONNELL and Donald Aberle, President of TEMORA, established a very close relationship, although O'DONNELL was still playing his little game that JAMES GLEASON had some right, title or interest in TEMORA and the

trusts holding the stock; that O'DONNELL had paid fees for TEMORA, in direct contradition of Moneymaker's Answers to Interrogatories; that O'DONNELL arranged to be appointed "investment advisor" for TEMORA in May of 1976; arranged to have a new trust set up in Guernsey Channel Islands, to replace NUOVO ANSTALT; that there was a close relationship between O'DONNELL, TEMORA and Attorney Moneymaker during this period of time.

16. TEMORA's Directors, Aberle, Bowe and Burrows, were properly noticed for Depositions the first part of April, 1981, in the American Embassy, Bahamas. With all of the information and documents in the possession of Mr. Piccoli at that time, the Deposition of Mr. Aberle could have been very interesting had he appeared. He did not appear, nor

did the other two officers. Instead, they sent an attorney to claim their privilege under the Bahamian law, even though Mr. Moneymaker, with tongue in cheek, pleaded with their attorney to have them appear. The Court finds that said failure to appear was willful and deliberate and in direct violation of this Court's Order.

CONCLUSIONS OF LAW

1. This Court acquired in rem jurisdiction of this action due to the fact that part of the real property is situated in the County of Elko, State of Nevada. That TEMORA, by and through its attorney, Richard Moneymaker, made a general appearance and the Court acquired personal jurisdiction to enter any and all Orders pertaining to the

California real property. That all other Defendants have failed to answer or otherwise plead after having been duly served with process, either personally or by publication, and default is hereby entered against BOYD JAMES O'DONNELL, JOAN O'DONNELL, JAMES GLEASON and NUOVO ANSTALT.

2. A debtor who wishes to conceal his assets from his creditors can acquire a Bahamian corporation and transfer his assets to said corporation through either a fictitious person or straw man. The board of directors of said corporation are nothing more than puppets. The stock is then issued to a Liechtenstein trust. The trustee then becomes a member of the board of directors. The debtor then controls the corporation and its assets through the

trustee. Both countries have laws that permit and, in fact, guarantee a veil of secrecy surrounding the ownership of these entities, and it is next to impossible for a creditor or any other third person to obtain any information as to the true beneficiary of the trust. One drawback of this scheme is that this Court considers that any debtor who goes to this much trouble really, really has something to hide. The person who has something to hide in this case is none other than BOYD JAMES O'DONNELL. Such a scheme in and of itself is a paramount "badge of fraud." Another pitfall is when the assets are real property situate in the U.S.A. and there is litigation as to the ownership and title. When the Bahamian corporation makes a

general appearnace to protect its interest in the real property, it submits to the jurisdiction of the Court in the United States where the land is located. When the Board of Directors are noticed for Depositions, they are subjected to the laws of the Court in which the suit is pending, and cannot then attempt to hide behind the secrecy laws of the Bahamas. If they do, sanctions can and will be imposed, pursuant to NRCP 37(d).

3. TEMORA's Board of Directors willfully and deliberately and in defiance of this Court's Order, refused to appear for their Depositions. Such contempt calls for the maximum sanctions provided, pursuant to NRCP 37(d).

4. TEMORA's attorney, Richard M. Moneymaker, has deliberately blocked and delayed Plaintiff's efforts to make

discovery. That as TEMORA's attorney-in-fact he has given false information in answering Interrogatories in respect to O'DONNELL's association and connection with TEMORA.

5. That for the willful and deliberate refusal to make discovery, the Defendants' Answer should be stricken and Summary Judgment entered for the Plaintiff and against the Defendants on Plaintiff's Third and Sixth Causes of Action in the Fourth Amended Complaint. **Skeen v. Valley Bank of Nevada**, 89 Nev. 301, 511 P.2d 1053 (Nev. 1973). The conveyances from O'DONNELL or his entities to JAMES GLEASON were fraudulent conveyances, and the title to all of the subject property vested in the Plaintiff Trustee in Bankruptcy upon the filing of the Petition in Bankruptcy on March 13,

1970, as provided by Sec. 70 of the Bankruptcy Act as Amended to 1968 (11 U.S.C. 110).

6. In further support of Summary Judgment, TEMORA's Board of Director's refusal to make discovery raises a presumption that, had they appeared for their Depositions, the evidence presented would have supported the allegation of the Plaintiff's Third and Sixth Causes of Action. See NRS 47.250(3).

7. Badges of fraud are recognized as proof of a fraudulent conveyance. Leonardo v. Leonardo, 251 F.2d 22 (D.C. Cir. 1958), Smith v. Popham, 266 Ore. 625, 513 P.2d 1172 (1973), First National Bank of Omaha v. First Cadco Corporation, 189 Neb. 743, 205 N.W.2d 115 (1973), and Payne v. Gilmore, 382 P.2d 140 (Okla. 1963). Hibernia Bank v. La.

Ave. Realty Co., 79 S. 554 (La. 1918); **Estate of Cleo B. Reed v. Butcher**, 566 P.2d 587 (Wyo. 1977); **U.S. v. Leggett**, 292 F.2d 423 (6th Circuit) states the general rule at pages 426-247:

> The issue of fraud is commonly determined by certain recognized indicia, denominated "badges of fraud," which are circumstances so frequently attending fraudulent transfers than an inference of fraud arises from them. **Pergrem v. Smith, Ky., supra**, 255 S.W.2d 42, 44; **Leonardo v. Leonardo**, 251 F.2d 22, 27; **Bentley v. Caille**, 289 Mich. 74, 78, 286 N.W. 163, 164. Inadequacy of consideration, secret or hurried transactions not in the usual mode of doing business, and the use of dummies or fictitious parties are common examples of "badges of fraud." As said in the Bentley case, supra: "No effort to hinder or delay creditors is more severely condemned by the law than an attempt by a debtor to place his property where he can still enjoy it and at the same time require his creditors to remain unsatisfied." Although "badges of fraud" are not conclusive and are more or less strong or weak according to their nature and the

number occurring in the same case, "a concurrence of several badges will always make out a strong case."

8. Plaintiff should recover his costs of suit.

DATED this 13th day of July, 1981.

/s/ Jos. O. McDaniel
DISTRICT JUDGE

No. 14762

IN THE DISTRICT COURT
OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF ELKO

WALLACE PERRY as Trustee of the Estates of BOYD JAMES O'DONNELL and JOAN O'DONNELL, Bankrupts,

Plaintiff,

vs.

BOYD JAMES O'DONNELL, JOAN O'DONNELL, TEMORA TRADING COMPANY, LTD., a Bahamian corporation, MICHAEL W. MOGAN, BURTON BERGERON, EUGENE FOX, TED IVY, JAMES GLEASON, a fictitious person, NUOVO ANSTALT, a Liechtensteinian trust, and DOES I through 100, inclusive,

Defendants.

F I L E D:
1981 JUL 13 PM 2:50
Clerk R.L. Kane
/s/ Deputy

DECREE QUIETING TITLE
AND JUDGMENT

Plaintiff's Motion to Dismiss for Failure to Make Discovery and in the

Alternative for Summary Judgment having come on for hearing May 12, 1981, and the Court after examining the affidavits and other documentation produced by the parties and considering the memoranda and oral arguments of counsel, and the Court having filed its Findings of Fact and Conclusions of Law;

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiff is the owner in fee simple and entitled to the possession of certain real property situated in the County of Elko, State of Nevada, described in Exhibit A attached hereto. Together with the funds received from MICHAEL W. MOGAN, BURTON BERGERON, EUGENE FOX AND TED IVY (purchasers in good faith under Contracts with O'DONNELL).

2. The claims of Defendants BOYD JAMES O'DONNELL, JOAN O'DONNELL, NUOVO ANSTALT, JAMES GLEASON, and TEMORA TRADING COMPANY, its officers, directors, agents, attorneys at law and attorney-in-fact, and all who may claim title under them as to said real property are without any right whatever, and said persons and corporation have no estate, right, title, lien, or interest whatever in or to said real property or any part thereof, or said funds, and are all permanently enjoined from claiming or asserting any estate, right, title, lien, or interest in or to said real property of funds or any part thereof;

3. Defendant TEMORA TRADING COMPANY and Richard M. Moneymaker, as attorney-in-fact, their officers, agents, representatives, employees, attorneys, and

all other persons in active concert and participation with them are hereby ordered to execute a Deed to Plaintiff, with thirty (30) days, to the following real properties in the State of California:

(a) Lot 60 in Tract 21360, in the County of Los Angeles, State of California, as per map recorded in Book 587, Pages 59 to 63 of Maps, in the office of the County Recorder of said County, commonly known as 1065 North Hillcrest Road, Beverly Hills, California.

(b) The easterly 82.5 feet of the westerly 165 feet of Lot 511 of Tract 1000, in the County of Los Angeles, State of California, as per map recorded in Book 19, Pages 1 to 34, inclusive, of Maps in the office of the

Recorder of said County, except the South 250 feet thereof, commonly known as the R-4 Lot on Sherman Way, Van Nuys, California.

(c) 57 Arcola Avenue, North Hollywood, being Lot 1 of Tract No. 11,650 as per map recorded in Book 2420 Page 25 in official records of said County Recorder of Los Angeles County.

(d) Lot 253 of Tract 323 as per map recorded in Book 14, Page 85 of maps in the office of the County Recorder of Los Angeles County.

(e) That certain real property situate in the County of San Bernardino, State of California, subject to various contracts of sale, commonly known as the "Hesperia Lands" described as: Tract 4725, Lots 213 and 231, as per map recorded in Book 59, Pages 72-75,

inclusive of Maps; Tract 4840, Lots 673, 2, 502, and 629, as per map recorded in Book 61, Pages 57-59 of Maps; Tract 4724, Lots 177 and 138, as per map recorded in Book 60, Pages 58-62 of Maps; Tract 4725, Lot 37, as per map recorded in Book 59, Pages 72-75, inclusive of Maps, all in the office of the County Recorder of San Bernardino County, California.

4. In the event of the properties listed in paragraph 3 have been sold, Defendant TEMORA TRADING COMPANY and Richard M. Moneymaker, as attorney-in-fact, their officers, agents, representatives, employees, attorneys and all persons in active concert and participation with them are hereby ordered to pay over to the Plaintiff any and all proceeds received from said sale or sales,

as well as any documentation pertaining to said sale, all within thirty (30) days from the date hereof.

5. The Court hereby specifically reserves jurisdiction to enter all necessary additional orders to effect the enforcement of the above Judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff recover his costs of suit.

ISSUED at Elko, Nevada, July 13, 1981.

/s/Jos. O. McDaniel
DISTRICT JUDGE

CERTIFICATE OF MAILING

The undersigned employee of the Fourth Judicial District Court hereby certifies that on the 13th day of July, 1981, one copy of the foregoing Decree Quieting Title and Judgment, and one

copy of Order Granting Plaintiff's Motion to Dismiss for Failure to Make Discover, and Summary Judgment were mailed to each of the following-named attorneys:

1. Richard M. Moneymaker, Esq., Moneymaker & Morrison, 700 S. Flower Street, Suite 1702, Los Angeles, California 90017
2. Richard G. Barrows, Esq., Wilson, Wilson & Barrows, Ltd., P. O. Box 389, Elko, Nevada 89801
3. Russell Piccoli, Esq., Goldstein & Kingsley, 1110 E. McDowell Road, Phoenix, Arizona 85006
4. Robert B. Goicoechea, Esq., Goicoechea, DiGrazia & Marvel, P. O. Box 1358, Elko, Nevada 89801

/s/Beryl L. Jenkins
Beryl L. Jenkins

EXHIBIT A

The following real property situate in the County of Elko, State of Nevada:

TOWNSHIP 36 NORTH, RANGE 58 EAST, M.D.B.&M.
Section7: N 1/2 SE 1/4
Section 29: NE 1/4 NW 1/4

TOWNSHIP 37 NORTH, RANGE 58 EAST, M.D.B.&M.
Section 11: SW 1/4 SE 1/4; NW 1/4 SE 1/4
Section 25: SW 1/4
Section 35: NE 1/4

TOWNSHIP 38 NORTH, RANGE 58 EAST, M.D.B.&M.
Section 25: NW 1/4 SW 1/4

TOWNSHIP 37 NORTH, RANGE 59 EAST, M.D.B.&M.
Section 17: SE 1/4

TOWNSHIP 37 NORTH, RANGE 59 EAST, M.D.B.&M.
Section 31: NE 1/4; W 1/2 SE 1/4; W 1/2 E1/2 SE 1/4

TOWNSHIP 38 NORTH, RANGE 59 EAST, M.D.B.&M.
Section 29: N 1/2 NW 1/4 SE 1/4; SW 1/4

TOWNSHIP 35 NORTH, RANGE 57 EAST, M.D.B.&M.
Section 1: N 1/2 SE 1/4

D O N O T P U B L I S H

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN THE MATTER OF
BOYD O'DONNELL
and
JOAN O'DONNELL, Bankrupts.

TEMORA TRADING CO.,
Plaintiff-Appellant,
vs.
WALLACE PERRY, Trustee.

NO. 76-1837

F I L E D
JAN 26, 1979
Emil E. Melfi, Jr. Clerk
U.S. Court of Appeals

MEMORANDUM

Appeal from the United States
District Court for the Central
District of California

Before: ELY and TRASK, Circuit Judges, and FITZGERALD, * District Judge.

Upon the filing of voluntary petitions for bankruptcy in Arizona, bankruptcy proceedings were commenced against Boyd and Joan O'Donnell, and pursuant thereto, a trustee, Wallace Perry, was duly appointed. Thereafter the trustee, learning of properties previously owned by the bankrupts and located in Southern California and Nevada, instituted ancillary proceedings in the District Court for the Central District of California. The trustee contended in those ancillary proceedings that the disposition of the properties to various persons, including one James

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* Honorable James M. Fitzgerald, United States District Judge, District of Alaska, sitting by designation.

Gleason, constituted a fraud upon the bankrupts' creditors and accordingly, the trustee sought and secured personal injunctions against further disposition of the properties by the transferees. However, prior to the issuance of these injunctions, Mr. Gleason had transferred all his interests in the subject properties to Temora Trading Co., a Bahamian corporation, in return for a beneficial interest in the shares of Temora. Three years after issuance of the requested injunctions appellant, Gleason's successor-in-interest, brought this collateral proceeding in the bankruptcy court for the Central District of California, seeking to set aside the Gleason injunctions as void for want of jurisdiction over the person. The bankruptcy judge refused to vacate the injunctions and

the district court affirmed without opinion. The sole issue we address here relates to the validity of those injunctions.

Our appellate jurisdiction is conferred by 28 U.S.C. §1292(a)(1), an appeal from an order of the district court refusing to dissolve an injunction.

Although the trustee failed to file a brief, he sent a brief communication to the clerk of court suggesting that the appeal was moot on the ground that Temora had succeeded in disposing of the properties despite the existence of the injunctions. However, at oral argument the issue of mootness was conceded to be without merit. This compels us to address the issue in this case: whether the bankruptcy court in the ancillary

proceedings had personal jurisdiction to issue the injunctions against Gleason.

The issue of lack of jurisdiction over the person was not raised before the original bankruptcy judge prior to issuance of the injunctions, presumably because Gleason never made an appearance before the court, personally or otherwise. The basis for the ancillary proceeding, as alleged by the trustee, was that Gleason was an alter ego of the bankrupts and that signatures of Gleason's name were actually executed by the bankrupts. At the time, although urging the "alter ego" theory, the trustee did not go so far as to allege that Gleason was a fictitious person. Instead, the trustee sought personal service of the moving papers on Gleason.

Appellant Temora Trading Co., having acquired title from Gleason prior to the issuance of the injunctions, challenged the validity of the injunctions in collateral proceedings brought in the Central District of California. [1] This was

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1/ It is clear from all the authorities that a collateral attack may be brought by any party, at any time, against a judgment void for want of subject matter jurisdiction or of jurisdiction over the person. Due to its jurisdictional nature such an attack is always timely and must be ruled upon by the court. See **Bookout v. Beck**, 354 F.2d 823, 825 (9th Cir. 1965). See also **Hanley v. Four Corners Vacation Prop., Inc.**, 480 F.2d 536, 538 (10th Cir. 1973); **Berry v. Allen**, 411 F.2d 1142, 1146 (6th Cir. 1969); **Davis v. St. Paul-Mercury Indemnity Co.**, 294 F.2d 641, 643 (4th Cir. 1961); **United States v. Sotis**, 131 F.2d 783, 787 (7th Cir. 1942); **United States v. Milana**, 148 F.Supp. 152, 154 (E.D. Mich. 1957). Accordingly, the referee's ruling that Rule 60(b) barred appellant's complaint was error. See **Bookout**, supra, at 825. See also **Comprehensive Merchandising Catalogs, Inc. v. Madison Sales Corp.**, 521 F.2d 1210, 1211 n. 1 (7th Cir. 1975); **Graciette v. Star Guidance, Inc.**, 66 F.R.D (continued)

the first time the jurisdictional issue was raised. At that time the trustee conceded in the pre-trial order that service had been improper, but, somewhat inconsistently from his original position in the ancillary proceeding, argued that Gleason was a fictitious person and that appellant had acquired its title through fraud. In the proceedings that followed, testimony offered by Temora Trading Co. showing that Gleason, in fact, did exist. The bankruptcy judge accordingly found Gleason was not a fictitious person. Nevertheless, on

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424, 426 (S.D.N.Y. 1975); Fed. R. Civ. Proc. 60(b), cl. 4; J. Moore, 7 Federal Practice, ¶60.25 [1] and 2 Federal Practice, ¶4.02[3], at 4-46 (2d ed. 1973); Wright and Miller, 11 Federal Practice and Procedure, §2862 at 197, 200 (1973).

other grounds, judgment was entered against Temora. 2/

Appellant Temora Trading subsequently appealed to the district court. At that time, the trustee shifted ground, contending service had been perfected by way of substituted service. It thus appears that the trustee is now prepared to concede the existence of Gleason. The district judge denied the appeal without opinion.

The following facts, elicited in the bankruptcy court below, reveal the basis

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2/ See note 1, supra. Despite the evidence that Gleason indeed existed (thus calling into question the adequacy of service), the bankruptcy judge concluded that plaintiff lacked standing below to contest the injunctions. We find that inasmuch, as the injunctions against its predecessor-in-interest clouded appellant's title to the subject properties, appellant had sufficient standing to contest their validity on jurisdictional grounds.

upon which we conclude that there was no perfected service of process on Gleason. The evidence squarely established while one Opal DeShong had been personally served (or served by mail) with the injunction papers intended for Gleason, Ms. DeShong had never been authorized by Gleason to receive service of process. Since Gleason himself was never served, we conclude that compliance with the service requirements of Rule 4(d)(1) of the Federal Rules of Civil Procedure was never accomplished.

Nor does the evidence reveal that substituted service was made under the terms of Rule 4(d)(7). That subsection permits service to proceed in the "manner prescribed by the law of the state" in which the district court sits. Although California Code of Civil

Procedure §415.20 allows for substituted service, such service is limited to delivery of copies to specific locations, including the person's "usual place of business." While the testimony revealed that Ms. DeShong had on at least one occasion met Gleason and notarized his signature on certain documents, the record is devoid of any support for the position that Wilden Realty (Ms. DeShong's place of employment) was Gleason's "usual place of business." Accordingly, we conclude that substituted service under the provisions of Rule 4(d)(7) was also never perfected. As a result, the personal injunctions issued by the ancillary bankruptcy proceedings in 1971 and 1972, having never been accompanied by acquisition of personal jurisdiction over Gleason through

personal appearance, service, waiver or otherwise, were improperly issued.

We conclude that the bankruptcy court never acquired jurisdiction over the person of James Gleason, a necessary prerequisite to issuance of any personal injunction enjoining his disposition of certain properties, and, accordingly, find that the injunctions were void ab initio. See cases cited in note 1, supra. The order below dismissing the appeal is reversed and the cause remanded with instructions to vacate the injunctions.

D O N O T P U B L I S H

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN THE MATTER OF
BOYD O'DONNELL
and
JOAN O'DONNELL, Bankrupts.

TEMORA TRADING CO.,

Plaintiff-Appellant,

vs.

WALLACE PERRY, Trustee.

NO. 76-1837
F I L E D
DEC 3 1979
Richard H. Deane
Clerk, U.S. Court of Appeals

ORDER MODIFYING MEMORANDUM OF DECISION

Appeal from the United States
District Court for the
Central District of California

D-12.

Before: ELY and TRASK, Circuit Judges, and FITZGERALD, * District Judge.

The third full sentence on page 3 of the Court's memorandum of decision of January 26, 1979 is modified to read:

> The Bankruptcy Court found it unnecessary to rule as to the existence of James Gleason and accordingly made no finding of fact in that regard.

This sentence replaces the sentence currently reading: "The bankruptcy judge accordingly refused to find that Gleason was a fictitious person."

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* Honorable James M. Fitzgerald, United States District Judge, District of Alaska, sitting by designation.

No. 3 of 1980

An Act to amend the Banks and Trust Companies Regulation Act, 1965.
(Assented to: 24th March, 1980)
Commencement: 24th March, 1980)

Enacted by the Parliament of The Bahamas.

1. This Act may be cited as the Banks and Trust Companies Regulation (Amendment) Act, 1980.

2. Section 10 of the Banks and Trust Companies Regulation Act, 1965 is repealed and the following section substituted --

> 10. -- (1) No person who has acquired information in his capacity as --
>
> (a) director, officer, employee or agent of any licensee or former licensee;
>
> (b) counsel and attorney, consultant or auditor of the Central Bank of The Bahamas, established under section 3 of the Central Bank of The Bahamas Act, 1974, or as an

employee or agent of such counsel and attorney, consultant or auditor;

(c) counsel and attorney, consultant, auditor, accountant, receiver or liquidator of any licensee or former licensee or as an employee or agent of such counsel and attorney, consultant, auditor, accountant, receiver or liquidator;

(d) auditor of any customer of any licensee or former licensee or as an employee or agent of such auditor;

(e) the Inspector under the provisions of this Act,

shall, without the express or implied consent of the customer concerned, disclose to any person any such information relating to the identity, assets, liabilities, transactions, accounts of a customer of a licensee or relating to any application by any person under the provisions of this Act, as the case may be, except --

(i) for the purpose of the performance of his duties or the exercise of his functions under this Act, if any; or

(ii) for the purpose of the performance of his duties within the scope of his employment; or

(iii) when a licensee is lawfully required to make disclosure by any court of competent jurisdiction within The Bahamas, or under the provisions of any law of The Bahamas.

(2) Nothing contained in this section shall --

(a) prejudice or derogate from the rights and duties subsisting at common law between a licensee and its customer; or

(b) prevent a licensee from providing upon a legitimate business request in the normal course of business a general credit rating with respect to a customer.

(3) Every person who contravenes the provisions of subsection (1) of this section shall be guilty of an offence against this Act and shall be liable on summary conviction to a fine not exceeding fifteen thousand dollars or to a term of imprisonment not exceeding two years or to both such fine and imprisonment."

PERTINENT STATUTES

Section 11(e) of the Federal Bankruptcy Act of 1938 (11 U.S.C. Sec. 29 (e)) provides:

> e. A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. Where, by any agreement, a period of limitation is fixed for instituting a suit or proceeding upon any claim, or for presenting or filing any claim, proof of claim, proof of loss, demand, notice, or the like, or where in any proceeding, judicial or otherwise, a period of limitation is fixed, either in such proceeding or by applicable Federal or State law, for taking any action, filing any claim or pleading, or doing any act, and where in any such case such period had not expired at the date of the filing of the petition in bankruptcy, the

receiver or trustee of the bankrupt may, for the benefit of the estate, take any such action or do any such act, required of or permitted to the bankrupt, within a period of sixty days subsequent to the date of adjudication or within such further period as may be permitted by the agreement or in the proceeding or by applicable Federal or State law as the case may be.

Section 70(a) of the Federal Bankruptcy Act of 1938 (11 U.S.C. Sec. 110(a)) provides:

SECTION SEVENTY
(11 U.S.C. § 110)

§ 70. Title to Property. a. The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located (1) documents relating to his property; (2) interests in

patents, patent rights, copyrights, and trade-marks, and in applications therefor: Provided, That in case the trustee, within thirty days after appointment and qualification, does not notify the applicant for a patent, copyright, or trademark of his election to prosecute the application to allowance or rejection, the bankrupt may apply to the court for an order revesting him with the title thereto, which petition shall be granted unless for cause shown by the trustee the court grants further time to the trustee for making such election; and such applicant may, in any event, at any time petition the court to be revested with such title in case the trustee shall fail to prosecute such application with reasonable diligence; and the court, upon revesting the bankrupt with such title, shall direct the trustee to execute proper instruments of transfer to make the same effective in law and upon the records: (3) powers which he might have exercised for his own benefit, but not those which he might have exercised solely for some other person; (4) property transferred by him in fraud of his creditors; (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and

sold under judicial process against him, or otherwise seized, impounded, or sequestered: Provided, That rights of action ex delicto for libel, slander, injuries to the person of the bankrupt or of a relative, whether or not resulting in death, seduction, and criminal conversation shall not vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process: And provided further, That when any bankrupt, who is a natural person, shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; (6) rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property; (7) contingent remainders, executory

devises and limitations, rights of entry for condition broken, rights or possibilities of reverter, and like interests in real property, which were nonassignable prior to bankruptcy and which, within six months thereafter, become assignable interests or estates or give rise to powers in the bankrupt to acquire assignable interests or estates; and (8) property held by an assignee for the benefit of creditors appointed under an assignment which constituted an act of bankruptcy, which property shall, for the purposes of this Act, be deemed to be held by the assignee as the agent of the bankrupt and shall be subject to the summary jurisdiction of the court.

All property, wherever located, except insofar as it is property which is held to be exempt, which vests in the bankrupt within six months after bankruptcy by bequest, devise or inheritance shall vest in the trustee and his successor or successors, if any, upon his or their appointment and qualification, as of the date when it vested in the bankrupt, and shall be free and discharged from any transfer made or suffered by the bankrupt after bankruptcy.

All property, wherever located, except insofar as it is

property which is held to be exempt, in which the bankrupt has at the date of bankruptcy an estate or interest by the entirety and which within six months after bankruptcy becomes transferable in whole or in part solely by the bankrupt shall, to the extent it becomes so transferable, vest in the trustee and his successor or successors, if any, upon his or their appointment and qualification, as of the date of bankruptcy.

The title of the trustee shall not be affected by the prior possession of a receiver or other officer an any court.

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NO. 82-489

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

TEMORA TRADING CO., INC.,

Petitioner,

vs.

WALLACE PERRY as Trustee
of the Bankrupt Estate of
Boyd James O'Donnell and
Joan O'Donnell, Bankrupts,

Respondent.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Mark I. Harrison
HARRISON & LERCH, P.C.
650 North Second Avenue
Phoenix, Arizona 85003
Tele: (602) 257-5800
Attorney for Respondent

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650 North Second Avenue
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Tele: (602) 257-5800
Attorney for Respondent

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BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent Wallace Perry, Trustee, respectfully opposes petitioner's request for review of the decision of the Supreme Court of the State of Nevada.

INTRODUCTION

This Court grants certiorari ". . . only when there are special and important reasons . . .". There are no such reasons in this case and since certiorari in this Court

is not a "matter of right",[1] petitioner attempts to bootstrap himself within this Court's jurisdiction by arguing that the issues involved reach constitutional dimensions. However, it will become evident to this Court, as it did to the Nevada Supreme Court, that the district court's[2] choice of sanctions (the striking of Temora's answer and entering default judgment), was not an abuse of discretion, in light of Temora's deliberate and willful refusal to make discovery.

There are no special or important reasons justifying consideration of the petition for a writ of certoriari and it should be denied.

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[1] Sup.Ct.R. 17; 85 F.R.D. 435, 438.

[2] The District Court of the Fourth Judicial District of the State of Nevada, in and for the County of Elko (hereinafter "district court").

STATEMENT OF THE CASE

This case is the culmination of over a decade of litigation involving fraud, perjury and the willful violation of court orders. Moreover, this is the second petition for certiorari[3/] to this Court in this case. The judgment challenged by petitioner is the final chapter in the epic struggle of the creditors of one Boyd James O'Donnell (hereinafter "O'Donnell"), to successfully navigate the exotic, fraudulent devices O'Donnell employed to place his substantial assets beyond their reach. The objective of these creditors, a number of parcels of real property in California and Nevada, which were at one time owned in fee simple by O'Donnell, now appear to constitute 100% of the real property assets of petitioner Temora Trading Company (hereinafter "petitioner" or "Temora").

In 1968, O'Donnell purported to

3/ U.S. v. O'Donnell, 539 F.2d 1233 (9th Cir. 1976), cert. denied, 429 U.S. 960 (1976).

convey all of his substantial assets to a "James Gleason". Soon after receiving all of O'Donnell's properties, "Gleason" allegedly transferred them to Temora, a Bahamian corporation, in return for most of its stock. The Temora stock was then transferred to a Liechtensteinian trust, Nuovo Anstalt. Thus, the original O'Donnell properties became controlled by a Liechtenstein trust.

In 1970, the O'Donnells declared bankruptcy[4/] and claimed all of their assets had been conveyed to "Gleason" leaving nothing for their creditors. Their discharge was ultimately denied[5/] for a number of reasons, most of which concerned O'Donnell's false statements during the course of the bankruptcy proceedings. The Ninth Circuit Court of Appeals affirmed the order of the

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4/ In re Boyd James O'Donnell & Joan O'Donnell, Nos. 70-414 and 70-415 (D. Ariz. 1970).

5/ In re Boyd James O'Donnell & Joan O'Donnell, Nos. 70-414 and 70-415 (D. Ariz., August 17, 1974).

Bankruptcy Court refusing to grant the discharge in January, 1978.[6] O'Donnell's false testimony in the bankruptcy trial resulted in a federal perjury conviction. The Ninth Circuit affirmed that conviction[7] and this Court denied certiorari.[8]

During the pendency of the O'Donnell bankruptcy proceedings, respondent, on a number of occasions, attempted to quiet title to the real property. These substantial real estate holdings were conveyed to a variety of fictitious persons,[9] foreign corporations[10] and foreign trusts,[11] but all were owned and

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[6] In re Boyd James O'Donnell & Joan O'Donnell, No. 75-2189 (9th Cir., Jan., 1978).

[7] U.S. v. O'Donnell, 539 F.2d 1233 (9th Cir. 1976), cert. denied 429 U.S. 960 (1976).

[8] 429 U.S. 960 (1976).

[9] James Gleason.

[10] Temora Trading Company, Ltd.

[11] Nuovo Anstalt and The Channel Island Trust.

controlled by O'Donnell. Since a transfer of property to a fictitious person is void and of no legal effect[12] and since Temora claims its title through "James Gleason", any claim on the part of Temora would fail if the transfers from O'Donnell to "Gleason" were nullities. The transfers were found to be fraudulent by the district court[13] and those findings were affirmed by the Nevada Supreme Court.[14]

Temora is alleged to be a legitimate enterprise owned and controlled by undisclosed principals. However, the uncontroverted facts before the district court and the Supreme Court of Nevada, clearly proved

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12/ Gayle v. Jones, 63 F.Supp. 481 (W.D. La. 1945).

13/ Perry v. O'Donnell, No. 14762 (Dist. Ct. Nev., July 13, 1981) (order granting plaintiff's motion to dismiss for failure to make discovery, and summary judgment). See petitioner's Appendix C-19.

14/ Temora Trading Company, Ltd. v. Perry, 645 P.2d 436 (Nev. 1982). See petitioner's Appendix A.

Temora to be nothing more than an instrumentality of O'Donnell's fraudulent scheme. Hence, it was not surprising that in 1976, the stock of Temora was transferred from the Liechtensteinian trust to a trust on the Isle of Guernsey. The beneficiary of that trust was O'Donnell. In some inexplicable way, O'Donnell ended up with control over the same properties that prior to filing for bankruptcy years earlier, he had transferred to "James Gleason".

"James Gleason" was and is a fictitious person, invented by O'Donnell for the purpose of placing his assets beyond the reach of his creditors. There is ample testimony in the record below that "Gleason" did not exist.[15/] For example, the attorneys who incorporated Temora testified they never

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15/ Brief for appellee, pp. 6-34, Temora Trading Company, Ltd. v. Perry, 645 P.2d 436 (Nev. 1982).

heard of or met a "James Gleason".[16] In addition, although "Gleason's" purported multimillion dollar real estate empire and the question of his very existence were being litigated over an 11-year period, "James Gleason" never once appeared.

Despite the fact that O'Donnell's discharge in bankruptcy was denied, all of O'Donnell's properties still remained outside the bankruptcy estate and therefore beyond the claims of his creditors. In an effort to regain the O'Donnell properties, an action was filed in Nevada by respondent-trustee on September 1, 1977.[17] This petition for certiorari arises out of that action. As finally amended, on or about May 14, 1980, the action sought to quiet title to the properties located in Elko County, Nevada.

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[16] Affidavit of Ralph David Seligman.

[17] Perry v. O'Donnell, No. 14762 (Dist. Ct. Nev., September 1, 1977) (complaint to quiet title to real property).

It also sought a mandatory injunction against Temora, ordering it to convey back certain real properties located in California, that had been fraudulently conveyed.

Respondent served interrogatories on Temora in January, 1978. Two months later, respondent received a smattering of responses in which nearly every interrogatory was objected to on grounds of relevance. Two years, eight months, 29 days and three orders compelling discovery later, Temora, through its attorney Richard Moneymaker, filed additional answers. Despite three court orders to answer all interrogatories,[18] Temora refused to answer six interrogatories and knowingly gave false information in response

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[18] Record on appeal, pp. 637-638, 1175-1177, 1381-1382, Temora Trading Company, Ltd. v. Perry, 645 P.2d 436 (Nev. 1982).

to at least 20 others.[19] O'Donnell's deposition testimony was similarly devoid of much factual basis.

Petitioner, its attorney Moneymaker and O'Donnell refused to comply with and blatantly defied the Nevada court's orders. This callous disregard for the district court's authority, in and of itself merited dismissal. However, this was not the end of the petitioner's contumacious conduct. On March 12, 1981, the depositions of Temora's officers, Donald Aberle, Anthony F. Bowe, and Lorraine D. Burrows, were duly noticed. These depositions were to be held at the American Embassy in Nassau, Bahamas, on April 2 and 3, 1981. After these depositions were noticed and prior to the time plaintiff's counsel left for the Bahamas, there were a

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[19] Perry v. O'Donnell, No. 14762 (Dist. Ct. Nev., July 13, 1981) (order granting plaintiff's motion to dismiss for failure to make discovery, and summary judgment). See petitioner's Appendix C-19.

number of conversations between counsel. Temora's counsel never gave any indication that its officers would not appear or participate as contemplated by the Nevada Rules of Civil Procedure. Nor did counsel state that it would claim a privilege under Bahamian law. Nor did counsel seek any protective orders.

At about 1:30 p.m., April 2, 1981, Temora's president failed to appear for his deposition.[20] Instead, Mr. Moneymaker appeared with a number of documents, but no deponents. Although the court on at least two occasions,[21] expressly ruled the relationship between Temora and O'Donnell to be relevant to this action, Moneymaker intentionally failed to bring any documentation or

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[20] Perry v. O'Donnell, No. 14762 (Dist. Ct. Nev., July 13, 1981) (order granting plaintiff's motion to dismiss for failure to make discovery, and summary judgment). See petitioner's Appendix C-18.

[21] See footnote 18.

correspondence pertaining to that relationship. Moneymaker had a Bahamian attorney make an incorrect statement about Bahamian law and the parties left.

The district court was quickly informed of Aberle's nonappearance late in the afternoon of April 2, 1981. At that time, one of respondent's counsel was sitting helplessly in Nassau, Bahamas, with no one to depose. The court realized that counsel had traveled to the Bahamas at great expense and had incurred thousands of dollars in attorneys' fees. Moreover, appreciating the time difference between Nevada and the Bahamas, it was important to transmit the contents of an order quickly, so that it could be communicated to Temora's counsel before he could leave the island. Under these circumstances, the district court obviously concluded it was acting in an emergency situation and the

discovery order issued by the district court was appropriate under Nevada law.[22]

The district court immediately entered an order compelling Temora to present all its officers the following day or face appropriate sanctions.[23] The court's order was communicated to Moneymaker that evening. Despite the clarity of the court's order, Moneymaker brazenly flaunted the court's authority by again failing to produce any of the witnesses. Moreover, he refused to produce any of the documentation surrounding Temora's relationship with Boyd O'Donnell, stating it would just be far too burdeonsome to assemble for inspection the 20 or so letters concerning O'Donnell.

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[22] Rules 30(b) and 26(c) N.R.C.P.; cf. Monroe, Ltd. v. Central Telephone Company, 91 Nev. 450, 538 P.2d 152 (1975).

[23] Perry v. O'Donnell, No. 14762 (Dist. Ct. Nev., April 2, 1981) (order compelling discovery). See Appendix A.

No great imagination is required to conclude that O'Donnell and Moneymaker were in the process of perpetrating a fraud upon the district court and were frustrating any attempt by the respondent to prove it. On April 16, 1981, respondent brought a motion to dismiss and for summary judgment. This motion was based in part on the failure of Temora's officers to appear for scheduled depositions. In ruling on this motion, it was evident to Judge McDaniel that petitioner had made a circus out of the discovery process. Under these circumstances the district court was not obligated to endure the O'Donnell and Moneymaker flimflam any longer. The court was presented with uncontroverted evidence that certain interrogatories contained false information. In addition Temora had refused to answer certain interrogatories and to produce certain documents, in direct violation of the court's order to do so. When Temora also failed to produce its officers

for depositions on April 2, 1981, in direct violation of his order, Judge McDaniel had a solid basis for dismissing Temora's answer and awarding default judgment. Therefore, on July 13, 1981, after reviewing the motion to dismiss and petitioner's response to that motion, Judge McDaniel issued an order granting respondent's motion to dismiss for failure to make discovery and summary judgment.[24/] The Nevada Supreme Court affirmed Judge McDaniel's findings on May 27, 1982,[25/] and denied petitioner's motion for rehearing on June 23, 1982.[26/]

The petitioner's fraudulent conduct and disregard for judicial authority warrant the denial of the petition for certiorari without regard to the merit, if any, of its legal position.

[24/] See Appendix A.

[25/] Temora Trading Company, Ltd. v. Perry, 645 P.2d 436 (Nev. 1982). See petitioner's Appendix A.

[26/] See petitioner's Appendix B.

ARGUMENT

THE SANCTIONS IMPOSED ON TEMORA WERE NOT AN ABUSE OF THE DISTRICT COURT'S DISCRETION.

Temora fails to appreciate the basic legal issue in this case and accordingly many of its arguments are misdirected. For example, neither the statute of limitations issue nor the res judicata issue are subject to this Court's review. Neither issue led to the default judgment by the district court nor did the Nevada Supreme Court concern itself with either issue. The sole issue raised by the petition is, whether the trial judge abused his discretion (and violated petitioner's constitutional rights) when he imposed sanctions for petitioner's willful and deliberate noncompliance with the discovery rules and the court's discovery orders.

When it is determined that counsel or a party has acted willfully or in bad faith in failing to comply with rules of

discovery or with court orders enforcing the rules it is within the discretion of the trial court to dismiss the action or to render judgment by default against the party responsible for noncompliance. Federal Rules of Civil Procedure 37.[27] Under Rule 37, the courts have an arsenal to assure discovery against the obfuscating or reluctant party. Cine Forty-second Street Theatre Corporation v. Allied Artists Pictures Corporation, 602 F.2d 1062 (2nd Cir. 1979). Severe sanctions may issue for failure to obey an order to provide discovery. Here, the court struck Demora's answer and granted default judgment to respondent. The facts clearly indicate that the trial judge acted properly; litigants who are willful in halting the discovery process act in opposition to the authority of the court and cause impermissible prejudice to their opponents. It is even more important

[27] N.R.C.P. Rule 37 is identical to Fed.R.Civ.P. 37.

to note, in this era of crowded dockets, that they also deprive other litigants of an opportunity to use the courts as a serious dispute/settlement mechanism. In short, while the sanction of dismissal cannot be imposed lightly, it is available to the court to ensure the efficient and fair use of discovery. "Without adequate sanctions the procedure for discovery would be ineffectual", Wright & Miller, Federal Practice & Procedure: Civil § 2281; see also, Ohio v. Arthur Anderson & Co., 570 F.2d 1370, 1376 (10th Cir. 1978), cert. denied, 439 U.S. 833 (1978).

It is well-settled, under the standards set forth in National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976), per curiam; and Societe Internationale v. Rogers, 357 U.S. 197 (1958), that the entry of a dismissal or default judgment under Rule 37 requires a showing of "willfulness, bad faith, or fault" on the

part of the noncomplying party.[28] It is equally well-settled that the choice of an appropriate discovery sanction is primarily the responsibility of the trial judge and will not be reversed absent an abuse of discretion. National Hockey League, supra at 642.

The trial judge should tailor the choice of sanction to the severity of the misconduct and the judge must have considerable latitude to make the sanctions serve their function as both specific and general deterrents. Id. at 643. The Court in National Hockey League stated that in reviewing this issue, the question is not whether this Court or the Court of Appeals would have chosen to dismiss the suit, but whether the District Court abused its discretion in doing so. Id. at 642.

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[28] Also see Finkelman v. Clover Jewelers Boulevard, Inc., 91 Nev. 146, 532 P.2d 608 (1975); and Skeen v. Valley Bank of Nevada, 89 Nev. 301, 511 P.2d 1053 (1973).

Petitioner contends that its noncompliance with discovery procedures and discovery orders was not willful and therefore the sanctions imposed denied it due process.[29] Petitioner bases this contention on its unjustifiable reliance on a privilege under Bahamian law. Temora's reliance on its privilege was unjustified for several reasons:

1. On August 11, 1980, respondent made a motion to compel discovery.[30] On August 28, 1980, petitioner filed a response to that motion.[31] In that response, petitioner argued its Bahamian privilege. On September 9, 1980, the district court overruled petitioner's arguments and issued an

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[29] Petitioner's brief for certiorari at p. 21.

[30] Perry v. O'Donnell, No. 14762 (Dist. Ct. Nev.) (plaintiff's motion for discovery order, filed August 11, 1980).

[31] Perry v. O'Donnell, No. 14762 (Dist. Ct. Nev.) (defendant's response to motion to compel discovery, filed August 28, 1980).

order compelling discovery.[32] Thus, as far back as September, 1980, petitioner was on notice that its privilege argument was not an acceptable defense to a proper discovery request.

2. Prior to the scheduled depositions on April 2, 1981, Temora never sought a protective order under N.R.C.P. 26(c).[33]

3. When Temora refused to appear for scheduled depositions on April 2, 1981, the district court issued an order[34] which compelled Temora's appearance, again rejected their privilege argument and warned Temora that appropriate sanctions would be entered if it failed to appear. Temora

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[32] Perry v. O'Donnell, No. 14762 (Dist. Ct. Nev., September 9, 1980) (order granting motion to compel discovery). See Appendix B.

[33] N.R.C.P. 26(c) is identical to Fed.R.Civ.P. 26(c).

[34] See Appendix A-1.

refused to appear in spite of a direct court order to do so.

The circumstances reveal that petitioner was fully aware of the consequences for its failure to comply with discovery orders. Temora cannot now be heard to justify its conduct on the basis of a self-inflicted misunderstanding of Bahamian law. Temora never sought to free itself from a duty to attend the depositions, nor from its duty to comply with the court's discovery order. Therefore, it was not surprising when the district court expressly ruled that Temora's failure to attend was willful and that sanctions were appropriate.[35/]

The mere assertion of a privilege is not sufficient to excuse noncompliance with a proper discovery request or a direct court order. Al Barnett & Sons, Inc. v. Outboard Marine Corporation, 611 F.2d 32 (3rd

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35/ See petitioner's Appendix C-18-19.

Cir. 1979). In the Barnett case the court held "litigants may oppose discovery requests by seeking a protective order from the court . . . they cannot frustrate discovery by refusing to comply with a proper request". 611 F.2d 32, 35. In addition, Temora was given another opportunity to be heard when respondent filed its action for sanctions. Temora filed a memorandum in opposition to respondent's motion. Temora suffered no violation of its due process rights and the judge's decision, based on all the facts and arguments, was clearly not an abuse of his discretion.

Before imposing any sanction, the court should look to the overall conduct of the litigation. Ali v. A&G Company, Inc., 542 F.2d 595 (2nd Cir. 1976). Ordinarily, default would not be invoked for an isolated incident of discovery misconduct. Wilson v. Volkswagen of America, Inc., 561 F.2d 494

(4th Cir. 1977), cert. denied 434 U.S. 1020 (1978). Petitioner's conduct, when viewed in its totality, represents flagrant bad faith and a callous disregard of a party's obligations under the discovery rules.

In fact, the district court's findings clearly show how extensive petitioner's abuses were: The court held (1) that Temora had submitted to the jurisdiction of the district court of Nevada; (2) that when the officers were noticed for depositions they were subject to the laws of the district court; (3) if Temora's officers chose to disregard that jurisdiction, sanctions would be imposed; (4) Temora's attorney, Richard Moneymaker, had "deliberately blocked and delayed plaintiff's efforts to make discovery"; (5) that Moneymaker, as Temora's attorney-in-fact, had "given false information in answering interrogatories"; (6) "that for the willful and deliberate refusal to make dis-

covery, the defendant's answer should be stricken and summary judgment entered for the plaintiff . . ."; and (7) that the "conveyances from O'Donnell or his entities to James Gleason were fraudulent conveyances . . .".[36/]

The Nevada Supreme Court upheld the district court's findings stating that it was "supported by substantial evidence, including Temora's history of obstructing discovery, as well as the failure of Temora's officers to appear for their depositions".[37/] Thus, the district court as well as the Nevada Supreme Court, made specific factual findings regarding Temora's willful and deliberate failure to cooperate in the discovery process and with court orders compelling discovery.

As the Supreme Court noted in National Hockey League, supra,

[36/] See petitioner's Appendix C-17-20.

[37/] Temora Trading Company, Ltd. v. Perry, 645 P.2d 436, 437 (Nev. 1982). See petitioner's Appendix A-5-6.

> The most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. 427 U.S. at 643.

The district court's choice of sanctions in this case is also consistent with numerous decisions of the Courts of Appeals upholding the entry of dismissal orders and default judgments pursuant to Rule 37 of the Federal Rules of Civil Procedure.[38/]

CONCLUSION

The trial judge, having dealt with the parties and issues in this litigation for

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38/ For example, see, Hindmon v. National-Ben Franklin Life Insurance Corp., 677 F.2d 617 (7th Cir. 1982); Baker v. Limber, 647 F.2d 912 (9th Cir. 1981); Phillips v. Insurance Company of North America, 633 F.2d 1165 th Cir. 1981); Ross v. Meagan, 638 F.2d 646 (3rd Cir. 1981), per curiam; Affanato v. Merril Bros., 547 F.2d 138 (1st Cir. 1977); Lyell Theatre Corp. v. Loew's Corp., 682 F.2d 37 (2nd Cir. 1982).

almost four years, was in the best position to assess the need for the requested discovery and the petitioner's degree of noncompliance. The court patiently allowed the suit to proceed through four years of evasion and resistance to discovery. Indeed, the Nevada district court was even more tolerant of petitioner's failure to provide discovery than was the District Court in National Hockey League. Petitioner refused to answer interrogatories, gave false statements, refused to appear for depositions and willfully violated a number of other court orders. When faced with this persistent failure to respond to discovery and comply with its orders, the judge was forced to take action. In fact, no more serious refusal to comply with discovery is conceivable and the imposition of sanctions was well within the court's discretion.[39/]

[39/] N.R.C.P. 37; National Hockey League, supra; Finkelman, supra; Skeen, supra.

The conduct of Temora, and its representatives in this case, brought it within the ambit of Rule 37. The record presents a clear pattern of delay, deception and contumacious conduct on the part of petitioner. The court was reluctant to impose sanctions but the petitioner's misconduct left the court with no other viable alternative. There is nothing in the petition or the record which shows any abuse of discretion by the district court or any basis for this Court to grant the requested writ. Accordingly, the petition should be denied.

Respectfully submitted this 12th day of November, 1982.

HARRISON & LERCH, P.C.

BY Mark I. Harrison

Mark I. Harrison
650 North Second Avenue
Phoenix, Arizona 85003
Tele: (602) 257-5800
Attorneys for Respondent

CERTIFICATE OF MAILING

STATE OF ARIZONA)
) ss.
County of Maricopa)

The undersigned, a Notary Public in and for the County of Maricopa, State of Arizona, hereby states that under the direct supervision of Mark I. Harrison, Attorney for Respondent, she caused to be placed with Federal Express, a package containing the number of copies of the Brief in Response to Petition for Writ of Certiorari of Respondent addressed as follows:

The original and forty (40) copies were Federal Express to:

Alexander Stevas, Clerk
1 First Street, N.E.
Supreme Court of the United States
Washington, D. C. 20543

and

Two (2) copies were placed in the United States Post Office at Phoenix, Arizona, with Priority and First Class postage fully prepaid to:

Richard M. Moneymaker, Esq.
Suite 1702, Broadway Plaza
700 Flower Street
Los Angeles, California 90017

The above-mentioned mailings were accomplished on the 12th day of November, 1982.

Notary Public

My Commission Expires:
11/19/85

No. 14762

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

WALLACE PERRY, as Trustee of the Estates of BOYD JAMES O'DONNELL and JOAN O'DONNELL, Bankrupts,

Plaintiff,

vs.

BOYD JAMES O'DONNELL, TEMORA TRADING COMPANY, LTD., et al,

Defendants.

O R D E R

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The Plaintiff herein, by and through his attorneys, having moved ex parte for an Order to Compel Appearances for Depositions, and for Sanctions; and good cause having been shown therefor;

IT IS HEREBY ORDERED that LORRAINE D. BURROWS and ANTHONY F. BOWE appear for

depositions as scheduled on April 3, 1981, at the hours of 10:00 a.m. and 1:00 p.m. respectively; that DONALD B. ABERLE, appear for deposition at 1:00 p.m. on April 3, 1981; and

IT IS FURTHER ORDERED that any questions propounded at such depositions which relate to conversations and relationships between JAMES GLEASON, BOYD J. O'DONNELL and TEMORA TRADING COMPANY, LTD. are relevant, and are not privileged.

IT IS FURTHER ORDERED that should the above-named officers and directors of TEMORA TRADING COMPANY, LTD. fail to appear for such depositions, that the Court, upon a hearing duly and regularly set, will enter its Order for appropriate sanctions pursuant to Rule 37 of the Nevada Rules of Civil Procedure.

DATED this 2nd day of April, 1981.

/s/ Joseph O. McDaniel
DISTRICT JUDGE

No. 14762

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

WALLACE PERRY, as Trustee of the Estates of BOYD JAMES O'DONNELL and JOAN O'DONNELL, Bankrupts,

Plaintiff,

vs.

BOYD JAMES O'DONNELL, JOAN O'DONNELL, TEMORA TRADING COMPANY, LTD., a Bahamian corporation, MICHAEL W. MORGAN, BURTON BERGERON, EUGENE FOX, TED IVY, JAMES GLEASON, a fictitious person, NUOVO ANSTALT, a Liechtenstenian trust, and DOES I through 100, inclusive,

Defendants.

ORDER GRANTING MOTION TO COMPEL DISCOVERY

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CLERK R.L. Kane
DEPUTY Win Birdlell

It appearing to the Court that on the 14th day of May, 1980, the Plaintiff filed

his Fourth Amended Complaint. On the 27th day of May, 1980, the Defendant TEMORA TRADING COMPANY, LTD., filed its Answer. On August 11, 1980, the Plaintiff filed a Motion for Discovery Order, and the Defendant TEMORA filed a Response to Motion on August 28, 1980.

Between 1966 and 1970, the real property, the subject matter of this litigation, situate in the County of Elko, State of Nevada, and in the County of Los Angeles, State of California, was owned by the Defendant BOYD JAMES O'DONNELL. Prior to his filing a Petition for Voluntary Bankruptcy, the real property was transferred through JAMES GLEASON to the Defendant TEMORA TRADING COMPANY, LTD. According to Plaintiff's Motion to Compel Discovery filed July 11, 1978, it is one of their theories that TEMORA is a dummy corporation established by said BOYD O'DONNELL in which to attempt to fraudulently conceal assets from the

Bankruptcy creditors and the Trustee in Bankruptcy. The Interrogatories directed to TEMORA and filed on January 26, 1978, are an attempt to discover what connection, if any, existed between said BOYD O'DONNELL and TEMORA at the time it was established, and thereafter.

TEMORA's attorney has objected to most of the Interrogatories in "that the information is not relevant." N.R.C.P. 26 (b)(1) provides in part as follows:

> "It is not grounds for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

TEMORA's objections are therefore overruled.

IT IS HEREBY ORDERED that an Officer of TEMORA TRADING COMPANY, LTD., not its attorney, answer the following Interrogatories filed on January 26, 1978, within 60 days of the filing of this Order: Inter-

rogatory No. 1; Interrogatories 4 through 13, both inclusive; Interrogatories 22 through 120, both inclusive.

DATED this 9th day of September, 1980.

/s/ Jos. O. McDaniel
DISTRICT JUDGE

Office - Supreme Court, U.S.
FILED
NOV 28 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-489

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

TEMORA TRADING CO., INC.,

Petitioner,

vs.

WALLACE PERRY, as Trustee of the Bankrupt Estate of Boyd James O'Donnell and Joan O'Donnell, Bankrupts,

Respondent.

REPLY BRIEF ON CERTIORARI FOR PETITIONER TEMORA TRADING COMPANY, LTD.

RICHARD M. MONEYMAKER

Suite 606
700 South Flower Street
Los Angeles, CA 90017
(213) 622-1088

Attorney for Petitioner

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Suite 606
700 South Flower Street
Los Angeles, CA 90017
(213) 622-1088

Attorney for Petitioner

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No. 82-489

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TEMORA TRADING CO., INC.,

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Respondent.

REPLY BRIEF ON CERTIORARI FOR PETITIONER TEMORA TRADING COMPANY, LTD.

I.

STATEMENT OF FACTS

Perry sued Temora in 1977 in Nevada, in an rem action to quiet Temora's title to certain real estate located in Elko County, Nevada. The final, fourth

amended complaint alleged that certain transfers by the bankrupt Boyd O'Donnell, to one James Gleason, were void either 1.) because Gleason was a fictitious person, or 2.) the transfers were not supported by fair consideration.

The complaint did not attack the transfers by Gleason, 1971, to Temora, as fraudulent. Nor did it contend that Temora was the alter ego of Boyd O'Donnell. The reason was clear to everyone, but the Nevada trial court. Perry's rights as O'Donnell's trustee in bankruptcy were fixed at the date of bankruptcy on March 13, 1970. No transfers after that date, even to O'Donnell, would give Perry any claim to the property.

Segal v. Rochelle, 382 U.S. 375, 86 S.Ct. 511, 15 L.Ed.2d 428 (1966).

Temora, thus chose to answer the case and submit to the jurisdiction of the Nevada trial court. If it did not, it would lose its land through a default, in rem, judgment. It chose to answer since it knew that any and all state and federal statutes of limitation had all expired two years after the date of bankruptcy, pursuant to Bankruptcy Act Section 11(e).

Feldman v. First National City Bank, 511 F.2d 460 (2 CA 1975).

It also knew that Perry had lost in the trial before the Bankruptcy Judge in Los Angeles 1975, in his attempt to prove Gleason was a non-existent person. Thus, Perry was collaterally estopped to try that issue again. In fact, the following colloquy took place between the Bankruptcy Judge and Temora's

counsel, at the conclusion of the trial on June 25, 1975.

> "Mr. Moneymaker: Has there been a scrap, a shred of evidence presented by Mr. Turner (Perry's counsel) that Gleason and O'Donnell are one and the same.
>
> "The Court: No."
>
> (Ex. A p. 114, lines 11-14).

This transcript had been introduced into evidence by Temora as Defendant's Exhibit A.

And again.

> "The Court: Now you're right, Turner has not proved what he promised. He promised in his opening statement that he would prove that Gleason was a fictitious name or that Gleason and O'Donnell were the same. He didn't."
>
> (Ex. A p. 116, lines 11-14.)

With this background, Temora anticipated little difficulty in defending its title, and winning a Motion for Summary

Judgment. When it filed its motion, however, the Nevada trial court denied its motion and then permitted Perry to expand its in rem action to bring in the issue of title to Temora's land in California, over Temora's objection. And when Temora's counsel quite properly sought a reconsideration of these rulings, the Nevada trial judge made the following statement in his written order.

> "Temora's attorney Mr. Richard M. Moneymaker has contended that Plaintiff has no evidence to sustain his cause of actions and that this litigation and the past litigation are pure and simple harassment. The only way for this Court to determine if this is true is by a trial. It will be interesting to see if Mr. Moneymaker has the strength of his own convictions and will go to trial on the merits or whether he will go whining off to the Nevada Supreme Court for a Writ resulting in further delay of the trial on the merits."

This early incredible written slur by the Nevada trial court to Temora's counsel, was only the first of a series of rulings and statements resulting in the present miscarriage of justice.

II.

ARGUMENT

1. Perry's Factual Contentions Are Accusations Only.

In Perry's Statement of the case, he continues his successful trial technique of using accusations and argument in place of evidence. This court must keep in mind that the Nevada trial court granted a default judgment after striking Temora's answer.

No trial ever occurred. Perry has never presented any evidence in support of any of his accusations. Temora has

never had the opportunity of confronting witnesses, objecting to testimony, or exhibits, or of presenting witnesses and evidence on its own behalf. At the hearing upon Perry's Motion for Sanctions and for a Summary Judgment, Perry never offered into evidence any deposition transcripts, any affidavits or any documents. The trial court neither received nor accepted a single exhibit into evidence from Perry.

Nevertheless, a biased and hostile trial judge purported to make extensive "findings of fact" in regard to the motion for summary judgment, which show on their face that there were unresolved issues of fact requiring a trial before an unbiased trier of fact.

Nevada Rules of Civil Procedure 56.

However, even those unsupported, and legally improper findings do not support Perry's present and continued accusations that James Gleason was a fictitious and non-existent person. Findings of Fact No. 1 through 3 clearly find Gleason did exist.

> Petitioners' Appendix C-2 and 3.

Perry did not appeal from that Summary Judgment and those findings are final as to him.

2. Temora Had No Prior History Of Obstructing Discovery.

Perry spends several pages attempting to show that the refusal of Temora's officers to attend the depositions in the Bahamas, because of non-compliance with Bahamian Law, was only the last in

series of obstructive and delaying tactics. This accusation is likewise false. The trial court, prior to this default judgment had never imposed sanctions on Temora. Temora had quite properly, sought protective orders and had raised the attorney-client privilege to much of Perry's discovery efforts. The trial court had sustained Temora in some cases and had overruled Temora on others. When ordered to comply with discovery, however, Temora had always complied to the full extent of its ability. The evidence of this is that the only sanctions imposed on either party, prior to striking Temora's answer, were against Perry. The court assessed him $500.00 in sanctions for failure to properly answer Temora's interrogatories. To compare that sanction to the

striking of Temora's answer demonstrates the uneven treatment practiced by the Nevada trial court.

3. The Nevada Discovery Order Was Void.

Perry had never conducted any discovery on the cause of action which he plead in his complaint. He never sought to examine into the transfers from O'Donnell to Gleason. Rather, with the complete backing of the Nevada trial court, Perry began a series of discovery actions looking into the business transactions of Temora years after the transfers from O'Donnell to Gleason.

Temora, quite properly, resisted, contending they were totally outside the issues of the lawsuit. However, when ordered it did supply the information

requested, that it had. It was never sanctioned by the trial court prior to the Bahama depositions.

Perry had noticed the depositions of Temora's officers in Nassau. Since 1976, Temora was being managed by the Columbus Trust Co. of Nassau. Temora did not know that Perry did not intend to comply with requirements of the Bahamian Banks and Trust Company Regulation Act of 1965, and seek an order for discovery from a Bahamian Court. Temora did know Perry was aware of the Act since it had raised it before the Nevada trial judge, on a prior occassion. It did know Perry had Bahamian counsel, since he needed to associate a Bahamian counsel to conduct his discovery. Only when Temora's counsel arrived in Nassau, did he discovered Perry's scheme.

Perry's counsel indicated he would not seek any order from a Bahamian Court. Temora's counsel then informed Perry's counsel that Temora's officers would not attend, absent such an order. Perry's counsel then telephoned his associate counsel in Elko, Nevada and had secured an ex parte order requiring Temora's officers appearance. Contrary to Perry's statement that order was never served on Temora, its officers or its counsel in Nassau. They had no opportunity to appear and oppose it, or seek a protective order, or even see and discuss it. Under Nevada law, such an ex parte order is void for lack of jurisdiction.

Monroe Ltd v. Central Telephone Co., 91 Nev. 450, 538 P.2d 152 (1975).

Mahew v. District Court, 88 Nev. 26, 49 P.2d 709 (1972).

Farnow v. Dept. 1 of Eighth Judicial District Court, 64 Nev. 109, 178 P.2d 371 (1947).

Perry's counsel informed Temora's counsel that the order had been issued and reset the depositions for the next day. Temora's counsel urged the officers of Columbus Trust Co. to attend the depositions even without an order. They refused. The counsel for Columbus Trust Co. and Temora's counsel then attended the deposition. Temora's counsel announced he had urged the attendance of these witnesses. The Columbus Trust Company's attorney confirmed the fact but announced they would not attend until Perry followed Bahamian legal procedure. Thus the order resulting in the striking of Temora's answer followed the Nevada pattern of no hearing, no opportunity to object, and no evidence.

4. The Nevada Supreme Court Decision.

The Nevada Supreme Court knew that it could not sustain the so-called Summary Judgment portion of the trial court, since the findings showed on their face that there were unresolved issues of fact, requiring a trial. It also realized that the findings mandated a judgment for Temora even if a default judgment was entered, since Findings of Fact 1 through 3 found Gleason existed. If Gleason existed than any other cause of action was barred by the statute of limitations, and under Nevada law, if the bar of the statute appears on the face of the complaint or judgment the court must apply it.

Kellar v. Snowden, 87 Nev. 488, 489 P.2d 90 (1971).

Thus the Supreme Court reversed and disregarded this central finding, despite the fact Perry had not appealed and it was a final judgment as to him. And in an effort to bolster its conclusion that Temora and its counsel had been obstructing discovery, it cites Seligman's deposition even though that deposition was never offered or received into evidence and quotes testimony that is obviously opinion and conclusionary, and not admissible into evidence even if offered.

Thus the Supreme Court of Nevada makes a crucial finding a contested issue of fact, to wit; that false answers had been given to written interrogatories, without hearing or evidence. Not even the trial court had found Seligman's opinion was admissible or had

based any finding or decision upon these statements.

The only comment the trial court made on the crucial point of the applicability of the Bahamian privilege, was to suggest Temora's counsel really didn't urge their appearance.

Petitioner's Appendix C-15.

There was again no hearing, no evidence and no testimony taken on Temora's good faith assertion of the Bahamian Bank & Trust Companies Regulation Act.

Finally, the default judgment quieted title to all of Temora's property including property which Gleason had never even received from O'Donnell. The trial court required no prove-up despite the fact it had acquired some assets from persons other than O'Donnell.

SUMMARY

Temora has received a civil "lynching" in the Nevada court system resulting in confiscation of its real estate in not only Nevada but also California. It has never received its day in court, and Perry has never been required to produce any evidence to support his charges. In the one case the matter went to trial, Perry lost totally on all points as demonstrated by the decision of the Ninth Circuit Court of Appeal.

Petitioner's Appendix D.

Dated: November 18, 1982.

Respectfully submitted,

Richard M. Moneymaker

Attorney for Petitioner